89-1697

No.

Supreme Court, U.S.
FILED
APR 30 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PATRICK M. O'RILEY,
Petitioner,
vs.
UNION OIL COMPANY OF CALIFORNIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION FOUR

PETITION FOR WRIT OF CERTIORARI

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47 pp

QUESTION PRESENTED

Do the state courts have concurrent jurisdiction with the federal courts over private damage suits under the Petroleum Marketing Practices Act, 15 U.S.C. Section 2801, et seq.?

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FILED FEBRUARY 1, 1990 A-1

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
FEBRUARY TERM, 1990

PATRICK M. O'RILEY,	)
	)
Petitioner,	)
	)
vs.	)
	)
UNION OIL COMPANY OF CALIFORNIA,	)
	)
Respondent.	)
	)

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT

STATE OF CALIFORNIA

Petitioner PATRICK M. O'RILEY petitions this Court for a Writ of Certiorari to review the Order of the Supreme Court of California denying review after Judgment and Decision of the Court of Appeal, Second District, rendered in this action.

OPINIONS BELOW

The Order Denying Review by the Supreme Court, State of California, is attached hereto as Appendix "A". The Decision of the Court of Appeal, Second District reversing the judgment of the Superior Court of Los Angeles County, is attached hereto as Appendix "B".

JURISDICTION

The Order of the Supreme Court, State of California, denying review after judgment by the Court of Appeal was filed February 1, 1990.

Jurisdiction is predicated on 28 U.S.C. Section 1257(c).

STATUTORY PROVISIONS INVOLVED

The following are listed pursuant to Supreme Court Rule 14 subd. 1(f), and are set forth in detail in Appendix "C".

1. Pertinent portions of 15 U.S.C. Sections 2801, 2802, 2803, 2804, 2805 and 2806.

PARTIES

All parties are named in the caption.

STATEMENT OF THE CASE

Because the issue presented is solely a legal one, only a few pertinent facts need be set forth.

Union Oil Company of California (Union or Union Oil) filed suit in Los Angeles County Superior Court in 1982 seeking damages for gasoline allegedly delivered to O'Riley's station and unpaid for. O'Riley cross-complained inter alia for breach of the PMPA's notice and renewal provisions.

A two-week jury trial occurred in February, 1987.

The jury found that Union violated the PMPA's requirements because it failed to give 90 days notice of termination, failed to personally deliver said notice and that, while it had valid grounds for termination, Union had deliberately

created said grounds in order to terminate O'Riley's franchise.

On his PMPA claims the jury awarded O'Riley damages of $162,000. The trial judge agreed that Union's violation of the act was deliberate and awarded O'Riley an additional $40,500 in exemplary damages, plus $42,650 in attorney's fees and expert witness fees.[1]

After the trial judge awarded exemplary damages, Union for the first time began to claim that the state court lacked jurisdiction over O'Riley's PMPA claims and so appealed the judgment. The California Court of Appeal agreed with Union, holding that jurisdiction over PMPA claims is exclusive in the federal

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[1]Pursuant to section 2805(d)(2) of the PMPA, the court, and not the jury, makes the award of punitive damages.

courts on October 24, 1989. (See Appendix "B".)

Petitioner sought review in the California Supreme Court, which was denied.

Thus, this petition has been filed.

REASONS FOR GRANTING THE WRIT

I

THIS PETITION SHOULD BE GRANTED BECAUSE IT PRESENTS AN UNRESOLVED QUESTION OF IMPORTANCE TO OUR FEDERAL SYSTEM OF JURISPRUDENCE.

A. Historical Overview

During the debate over ratification of the new Constitution, concern was expressed that the new federal courts might intrude upon traditional areas protected by state courts.

Writing in The Federalist Papers, Alexander Hamilton answered this concern:

> "[T]he State Courts will be divested of no part of their primitive jurisdiction, further than may relate to an appeal; and I am even of opinion that in every case in which they were not expressly excluded by the future Acts of the National Legislature, they will, of course, take cognizance of the causes to which those Acts give birth."

The Federalist No. 82, at 493 (A. Hamilton) (C. Rossiter ed. 1961).

Thus, historically, the doctrine of concurrent state-court jurisdiction over cases arising under federal law has evolved in a series of decisions by this court: state courts may assume subject-matter jurisdiction over a federal cause of action absent provision by Congress to the contrary or disabling incompatibility between the federal claim and state-court adjudication. Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 101 S.Ct. 2870, 69 L.Ed.2d 784 (1981); Dowd Box Co. v. Courtney, 368 U.S. 502, 82 S.Ct. 519, 7 L.Ed.2d 483. Indeed, there is a strong presumption that state courts enjoy concurrent jurisdiction. See California v. Arizona, 440 U.S. 59, 66-67, 99 S.Ct. 919, 923-24, 59 L.Ed.2d 144 (1979). The

presumption is rebutted only where Congress has either implicitly or explicitly confined jurisdiction to the federal courts. Gulf Offshore Co. v. Mobil Oil Corp., supra, 453 U.S. at 477, 101 S.Ct. at 2875.

B. Conflicting Cases

After Congress enacted the PMPA, 15 U.S.C. § 2801, et seq., the question almost immediately arose as to whether Congress intended concurrent or exclusive jurisdiction. The issue was first decided in the case of Ted's Tire Service, Inc. vs. Chevron, Inc., 470 F.Supp. 163 (D.Conn. 1979).

Ted's Tire Service decided that concurrent jurisdiction was the intent of Congress. For six years, the holding of Ted's Tire Service was cited only with approval in dozens of cases. Every court

that considered the issue simply cited the holding in Ted's Tire Service with approval. Then, in 1985, the matter was reconsidered in the case of Rustom vs. Atlantic Richfield Company, 618 F.Supp. 210, (CD Cal. 1985). Rustom, relying on its reading of the language and legislative history of the PMPA, decided that Congress intended exclusive federal jurisdiction over PMPA claims.

Several courts, including the court below in this case, have followed the Rustom decision, but without detailed analysis, simply assuming it to be correct.

C. Rustom's Reasoning Is Incorrect

The Rustom court cites the introduction to the Senate Report on the PMPA, and from this language, concludes that the legislative history of the PMPA shows

that Congress contemplated only federal court jurisdiction:

> "The provisions of Title 1 are enforceable by private civil action in U.S. District Court."

S.Rep. No. 95 - 731, 95th Cong., 2d Sess. 16, reprinted in 1978 U.S. Code Cong. and Ad. News 873, at page 874. Rustom v. Atlantic Richfield Company, supra., 618 F.Supp. 210 at 212.

However, reliance on this language is clearly misplaced. This language is necessary to confer jurisdiction on the federal courts. Federal courts are courts of limited jurisdiction, whereas state courts are courts of plenary jurisdiction. Congress need not explicitly indicate that state courts have jurisdiction in order to confer jurisdiction on the state courts, whereas federal courts do not have jurisdiction

unless Congress specifically so states.

Thus, in dealing with the exact same language, Justice Powell wrote in Gulf Offshore Oil Company v. Mobil Oil Corp., supra, 453 U.S. at 479 (1981), as follows:

> "It is black letter law. . . that the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action."

Next, Rustom then says:

> "There is a conspicuous absence in the reports of any reference to the bringing of PMPA actions in state court."

However, the latter conclusion is erroneous. When the Senate Report, cited by the Rustom court, discusses the private right of action created by the PMPA, it refers to "the courts" generally, saying:

> "The Courts are authorized to grant equitable relief to remedy the effects

> of any violation of the requirements of the legislation. The Courts are instructed to grant preliminary injunctions where:. . . "

S.Rep. No. 95 - 731, 95th Cong., 2d Sess. 16, reprinted in 1978 U.S. Code Cong. & Ad. News 873, at page 899. [Emphasis added]

This language is not restricted, as Rustom implies, to the federal courts.

Furthermore, in the preemption section of the PMPA, Congress merely provides that state laws dealing with the grounds for and notice of termination or nonrenewal are preempted "unless such provision of such law or regulation is the same as the applicable provision of this subchapter." PMPA, 15 U.S.C. § 2806 (a). Congress, obviously, contemplated continued state court enforcement of provisions the same as the PMPA and,

therefore, had no objection, to the state courts interpreting and applying the PMPA, just not laws that conflict with it.

Finally the Rustom decision is premised on two so-called references to the Federal Rules of Civil Procedure. The Act delineates the grounds for issuing an injunction and Rustom concludes that these grounds are the same ones normally used by the federal courts under Rule 65(a) of the Federal Rules of Civil Procedure. Furthermore, the PMPA says that the courts may award damages "consistent" with the Federal Rules of Civil Procedure. From these two oblique references, Rustom concludes that Congress contemplated exclusive federal jurisdiction.

However, if mere reference to the

federal rules alone determines jurisdiction, then every act which refers to the federal rules would automatically give rise to exclusive federal jurisdiction, certainly including the federal RICO statute held by the California Supreme Court in Cianci v. Superior Court (Poppingo), 40 Cal.3d 903, 221 Cal.Rptr. 574 (Cal.1985), to give rise to concurrent jurisdiction, since RICO makes extensive reference both to the Rules of Civil Procedure and federal enforcement mechanisms. Similarly, there are extensive references to the federal rules in the Bank Holding Company Act and in other Acts held to give rise to concurrent jurisdiction. Lane v. Central Bank of Alabama, N.A., 756 F.2d 814 (11th Cir. 1985).

Indeed, the rule that concurrent

jurisdiction is to be presumed would be thrown out the window if mere reference to the Federal Rules of Civil Procedure were enough to overcome it.

D. As a Matter of Important Federal Policy, Rustom is Incorrect

Congress articulated a broad remedial purpose in enacting the PMPA: ". . . to remedy disparity in bargaining power and to prevent arbitrary or discriminatory termination or nonrenewal" of petroleum franchises. S.Rep. No. 95 - 731, 95th Cong., 2d Sess. 16, reprinted in 1978 U.S. Code Cong. and Ad. News 873. In order to promote this purpose, Congress granted a private right of action for breach of the provisions of the Act.

In Cianci, supra, the California Supreme Court discussed a case where, as in the case of the PMPA, Congress had a

broad remedial purpose, and considered that such purpose might be thwarted by a holding of exclusive federal jurisdiction.

> "First, as a general matter, Congress unmistakably intended that section 1964(c) be liberally construed to effectuate its remedial purposes; exclusive jurisdiction would tend to limit or frustrate those purposes. . . this intention should strongly counsel us not to read the obstacle of exclusive jurisdiction into section 1964(c). . ."

Cianci v. Superior Court (Poppingo), 40 Cal.3d 903, 221 Cal.Rptr. 574 (Cal.1985)

If the PMPA dealt with an area that had previously been exclusively within the province of federal judges, or was an act of extreme complexity "the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims" (Gulf Offshore Company v. Mobil Oil

Corp., 453 U.S. 473, 483-484) would dictate that this court should rule that the PMPA contemplates exclusive federal jurisdiction. However, the PMPA deals with one aspect of an arena that is traditionally within the province of the state courts, the regulation of franchise contracts. The PMPA is simple and is narrowly limited to an area where Congress perceived a need for national uniformity, the grounds for and notice of termination or nonrenewal of a petroleum franchise. It is straightforward rather than complex. There is no earthly reason why a state court cannot or should not enforce the provisions of the PMPA.

If litigants are to be denied a state court forum, the broad remedial purpose of Congress will be frustrated, in direct contravention of this Court's long-

established presumption of concurrent jurisdiction.

E. Exclusive Federal Jurisdiction Will Cause Serious Problems

Exclusive federal jurisdiction might wreak havoc in federal court. Gasoline station franchisees, in many cases, will face the Hobson's choice of litigating against giant oil conglomerates, with almost unlimited resources, in more than one forum or foregoing their federal claims.

For example, in this case, Union Oil sued O'Riley in state court, for unpaid-for gasoline. O'Riley could then file his PMPA claims as a cross-complaint or in federal court. However, Union would have been free to continue in state court, even if a federal judge was receptive to pendent jurisdiction over

Union's state claim. Is it too much to believe that a rich litigant might take such an advantage?

Where unwilling litigants persist, or where busy federal judges do not wish to accommodate state claims, many disputes will be litigated in both state and federal court.

At least one court has adopted such reasoning to support a holding that Congress intended concurrent jurisdiction:

> ". . . one would normally expect a litigant to bring all his claims in a single forum. A holding to the contrary would, as a practical matter, frustrate the intent of Congress, since it seems likely that many litigants would forego an adjudication of their federal rights due to the cost and inconvenience of proceeding in a separate forum. Although the availability of pendent jurisdiction in the federal courts lessens this concern it does not eliminate it. Similarly a holding of exclusive federal jurisdiction would give litigant's who were unsuccessful in

> state court two "bites at the apple." This we decline to do."

Lane v. Central Bank of Alabama, N.A., 756 F.2d 814 (11th Cir. 1985), at page 817, note 2.

(Of course, a second bite at the apple is exactly what Union has sought ever since it lost in state court!)

Furthermore, this Court should recognize that a holding of exclusive federal jurisdiction will not prevent state courts from considering the PMPA. PMPA defenses, not removable to federal court, will still arise in state court, such as claims that the PMPA preempts existing state franchise legislation or that a franchise agreement was terminated in accord with the PMPA. Such defenses arise routinely as part of state court litigation over franchise agreements.

Finally, as noted, Congress has made express provision for the states to enforce identical legislation. PMPA, 15 U.S.C. § 2806(a).

Thus, a holding of exclusive federal jurisdiction will result in many problems, especially for litigants with limited resources, but will not prevent PMPA claims from being heard in state court.

CONCLUSION

Historically, there is a presumption of concurrent jurisdiction over federal causes of action. The conflict in the cases with regard to the PMPA is unresolved. The view favoring exclusive federal jurisdiction is predicated on an incorrect reading of the PMPA and its legislative history and conflicts with the presumption in favor of concurrent jurisdiction, threatening the broad remedial purpose which prompted Congress to enact the PMPA. Many disputes will have to be litigated in both state and federal courts, or litigants will have to forego their PMPA claims. However, this will not prevent PMPA claims from arising in state court. Accordingly, this case presents an important, unresolved federal

question which this court should decide.

Dated: April 27, 1990

RESPECTFULLY SUBMITTED:

_____

NEIL E. CAMPBELL, JR.
Attorney for Petitioner

APPENDIX "A"

Supreme Court
Filed
February 1, 1990
Clerk

Deputy

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Div. 4, No. B028866
S013098

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

IN BANK

UNION OIL COMPANY OF CALIFORNIA

v.

PATRICK M. O'RILEY, et al.

Respondent's petition for review DENIED.

Mosk, J. is of the opinion the petition should be granted.

S/Kennard
Acting Chief Justice

APPENDIX "B"

NOT FOR PUBLICATION

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION FOUR

UNION OIL COMPANY OF CALIFORNIA, Plaintiff, Cross-Defendant and Appellant, vs. PATRICK M. O'RILEY, Defendant, Cross-Complainant and Respondent.	)	FILED No. B028866 (Sup.Ct.No. SWC 64570) COURT OF APPEAL SECOND DIST. FILED OCT. 24, 1989 ROBERT N. WILSON, CLERK _____ Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County. William R. Hollingsworth, Judge. Reversed.

Besser & Chapin, Robert S. Besser and Christopher Chapin for Plaintiff, Cross-Defendant and Appellant.

Neil E. Campbell, Jr., for Defendant,

Cross-Complainant and Respondent.

Plaintiff/cross-defendant/appellant Union Oil of California (Union) appeals from that portion of the judgment awarding defendant/cross-complainant/respondent Patrick M. O'Riley (respondent) compensatory and punitive damages, based upon Union's alleged violation of the Petroleum Marketing Practices Act (PMPA). Union contends that the trial court lacked subject matter jurisdiction over respondent's PMPA claims. We concur and reverse the pertinent portion of the judgment.

FACTS

In June, 1981, Union and respondent entered into a one year trial service station lease with respect to a service station premises located in Wilmington,

California. Concurrently, they entered into a product supply agreement, which together with the lease, constituted a petroleum marketing franchise, as defined by the PMPA (15 U.S.C. § 2801 (1) (A) and (B).

All did not go well, and on December 16, 1981, Union gave respondent notice that unless amounts he owed Union were paid in five days, his franchise would be terminated. This notice of termination was personally delivered to respondent's service station by a Union representative and left with an employee for delivery to respondent.

Respondent did not pay the amounts due, and Union took possession of the station on December 21, 1981.

PROCEDURAL HISTORY

On September 13, 1982, Union filed a

complaint for money owed against respondent. Respondent answered and cross-complained for breach of contract, fraud, and wrongful termination of his franchise under the PMPA. The PMPA cause of action alleged that union did not have adequate grounds upon which to terminate respondent's lease, and Union failed to give adequate notice of termination as required by the PMPA.

After a jury trial, the jury returned a verdict in favor of Union on its complaint in the amount of $15,869.68, and in favor of Union on the contract and fraud claims of respondent's cross-complaint. On respondent's PMPA claim, the jury found that Union had violated the PMPA by "deliberately creating the indebtedness upon which it based [its] decision to terminate [the] franchise"

and by failing to give respondent 90 days notice and to personally deliver its notice of termination. The jury awarded respondent $162,000 for the loss of business; the court then awarded respondent attorneys' fees in the amount of $40,000, punitive damages in the amount of $40,500, and expert witness fees in the amount of $2,625.[1]

Union moved for judgment notwithstanding the verdict on the ground that the trial court lacked subject matter jurisdiction. In the alternative, Union moved for a new trial. On June 26, 1987, both motions were denied.

ISSUES ON APPEAL

Union contends that the trial court did

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[1]Pursuant to section 2805(d) (2) of the PMPA, the court, and not the jury, makes the award of punitive damages.

not have subject matter jurisdiction over respondent's claim under the PMPA, and substantial evidence is lacking to support the verdict on respondent's PMPA claim or to support a finding that Union acted in willful disregard of the requirements of the PMPA.

DISCUSSION

The determinative issue is whether the trial court had subject matter jurisdiction over respondent's PMPA claims.

Preliminarily, we reiterate the rule that subject matter jurisdiction cannot be waived and may be raised for the first time on appeal. (Unruh v. Truck Insurance Exchange (1972) 7 Cal.3d 616,622.) In addition, where the Congress of the United States has exercised its power to deprive state

courts of jurisdiction over a particular subject, state court judgments are "'nullities and vulnerable collaterally.'" (In re Marriage of Thomas) (1984) 156 Cal.App.3d 631, 636, quoting Kalb v. Feuerstein (1940) 308 U.S. 433.)

Subsequent to the trial of the instant matter, this court, relying on Rustom v. Atlantic Richfield Co. (D.C.Cal. 1985) 618 F.Supp. 210, held that the federal court retains exclusive jurisdiction over suits brought under the PMPA. (Niakan v. Samaan (1988) 199 Cal.App.3d 716, cert. den. 102 L.Ed.2d 572 (1988).) We have considered both Rustom, supra, and Niakan, supra, and are in accord with their holdings.

Respondent objects, relying almost exclusively on Johnson v. Mobil Oil Corp.

(Pa.Super. 1987) 528 A.2d 155, which held to the contrary. However, the Supreme Court of Pennsylvania reversed the lower court's holding and, also citing Rustom v. Atlantic Richfield Co., supra, held that the federal court retains exclusive jurisdiction over suits brought pursuant to the PMPA. (Johnson v. Mobil Oil Corp. (Pa. 1989) 560 A.2d 124, 125-156.)

DISPOSITION

At oral argument, counsel for Union Oil informed us that before trial commenced Union Oil and respondent entered into a stipulation, agreeing that should it later be determined that the trial court lacked subject matter jurisdiction, both parties could file their respective suits in federal court. This stipulation and our determination that the facts underlying Union Oil's complaint and

respondent's cross-complaint are closely related and intertwined prompt us to reverse the entire judgment in the interest of justice.

The judgment is reversed. Each party to pay its own costs.

NOT FOR PUBLICATION.

S/Goertzen, J.
GOERTZEN

We concur:

S/Woods (Arleigh), P.J.
WOODS

S/McClosky, J.
McCLOSKY

APPENDIX "C"

PETROLEUM MARKETING PRACTICES
SUBCHAPTER I - FRANCHISE PROTECTION

§ 2801. Definitions

. . .

§ 2802. Franchise relationship

General prohibition against termination or nonrenewal

(a) Except as provided in subsection (b) of this section and section 2803 of this title, no franchisor engaged in the sale, consignment, or distribution of motor fuel in commerce may -

(1) terminate any franchise (entered into or renewed on or after June 19, 1978) prior to the conclusion of the term, or the expiration date, stated in the franchise; or

(2) fail to renew any franchise relationship (without regard to the date on which the relevant franchise was entered into or renewed).

Precondition and grounds for termination or nonrenewal

(b)(1) Any franchisor may terminate any franchise (entered into or renewed on or after June 19, 1978) or may fail to renew any franchise relationship, if -

(A) the notification requirements of section 2804 of this title are met; and

(B) such termination is based upon a ground described in paragraph (2) or such nonrenewal is based upon a ground described in paragraph (2) or (3).

(2) For purposes of this subsection, the following are grounds for termination of a franchise or nonrenewal of a franchise relationship:

(A) A failure by the franchisee to comply with any provision of the franchise, which provision is both reasonable and of material significance to the franchise relationship, . . . -

. . .

(C) The occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable, . . .

Nonrenewal upon meeting statutory notification requirements

(c) If the notification requirements of section 2804 of this title are met, any franchisor may fail to renew any franchise relationship -

(1) under any trial franchise, at the conclusion of the initial term of such trial franchise; and

(2) under any interim franchise, at the conclusion of the term of such interim franchise, if -

(A) such nonrenewal is based upon a determination described in section 2802(b)(2)(E) of this title; and

(B) the requirements of section 2802(b)(2)(E)(ii) and (iii) of this title are satisfied.

§ 2804. Notification of termination or nonrenewal of franchise relationship

General requirements applicable to franchisor

(a) Prior to termination of any franchise or nonrenewal of any franchise relationship, the franchisor shall furnish notification of such termination or such nonrenewal to the franchisee who is a party to such franchise or such franchise relationship -

(1) in the manner described in subsection C of this section; and

(2) except as provided in subsection (b) of this section, not less than 90 days prior to the date on which such termination or nonrenewal takes effect.

Additional requirements applicable to franchisor

(b)(1) In circumstances in which it would not be reasonable for the franchisor to furnish notification, not less than 90 days prior to the date on which termination or nonrenewal takes effect, as required by subsection (a) (2) of this section -

(A) such franchisor shall furnish notification to the franchisee affected thereby on the earliest date on which furnishing of such notification is reasonably practicable; and

. . .

Manner and form of notification

(c) Notification under this section -

(1) shall be in writing;

(2) shall be posted by certified mail or personally delivered to the franchisee; and

(3) shall contain -

(A) a statement of intention to terminate the franchise or not to renew the franchise relationship, together with the reasons therefor;

(B) the date on which such termination or nonrenewal takes effect; and

(C) the summary statement

prepared under subsection (d) of this section. . .

§ 2805. Enforcement provisions

Maintenance of civil action by franchisee against franchisor; jurisdiction and venue; time for commencement of action

(a) If a franchisor fails to comply with the requirements of section 2802 or 2803 of this title, the franchisee may maintain a civil action against such franchisor. Such action may be brought, without regard to the amount in controversy, in the district court of the United States in any judicial district in which the principal place of business of such franchisor is located or in which such franchisee is doing business, except that no such action may be maintained unless commenced within 1 year after the later of -

(1) the date of termination of the franchise or nonrenewal of the franchise relationship; or

(2) the date the franchisor fails to comply with the requirements of section 2802 or 2803 of this title.

. . .

Actual and exemplary damages and attorney and expert witness fees to franchisee; determination by court of right to exemplary damages and amount; attorney and expert witness fees to franchisor for frivolous actions

(d)(1) If the franchisee prevails in any action under subsection (a) of this section, such franchisee shall be entitled -

(A) consistent with the Federal Rules of Civil Procedure, to actual damages;

(B) in the case of any such action which is based upon conduct of the franchisor which was in willful disregard of the requirements of section 2802 or 2803 of this title, or the rights of the franchisee thereunder, to exemplary damages, where appropriate; and

(C) to reasonable attorney and expert witness fees to be paid by the franchisor, unless the court determines that only nominal damages are to be awarded to such franchisee, in which case the court, in its discretion, need not direct that such fees be paid by the franchisor.

(2) The question of whether to award exemplary damages and the amount of any such award shall be determined by the court and not by a jury.

(3) In any action under subsection (a) of this section, the court may, in its discretion, direct that reasonable attorney and expert witness fees be paid by the franchisee if the court finds that such action is frivolous.

. . .

§ 2806. Relationship of statutory provisions to State and local laws

(a) To the extent that any provision of this subchapter applies to the termination (or the furnishing of notification with respect thereto) of any franchise, or to the nonrenewal (or the furnishing of notification with respect thereto) of any franchise relationship, no State or any political subdivision thereof may adopt, enforce, or continue in effect any provision of any law or regulation (including any remedy or penalty applicable to any violation thereof) with respect to termination (or the furnishing of notification with respect thereto) of any such franchise or to the nonrenewal (or the furnishing of notification with respect thereto) of any such franchise relationship unless such provision of such law or regulation is the same as the applicable provision of this subchapter.

. . .

Supreme Court, U.S.
FILED
MAY 29 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1697

In The

Supreme Court of the United States

October Term, 1989

PATRICK M. O'RILEY,

Petitioner,

vs.

UNION OIL COMPANY OF CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal Second Appellate District, Division Four

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should the Court review a California intermediate appellate court decision holding that federal courts have exclusive jurisdiction over claims under the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. § 2801 *et seq.*?

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INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner has failed to establish a basis for the Court to grant certiorari in this case: A panel of California appellate court justices has considered and followed a well-reasoned federal district court opinion and a California appellate court decision that adopted its analysis.

Petitioner has not demonstrated the existence of a question that would merit consideration by this Court. Petitioner only argues that the decision below follows one federal district court case rather than another.

Finally, the decision below is correct: A careful analysis of the issue establishes that federal courts have exclusive jurisdiction of PMPA disputes.

STATEMENT OF THE CASE

This is an action between a service station franchisee, Petitioner Patrick M. O'Riley ("O'Riley") and a petroleum marketing franchisor, Union Oil Company of California ("Union")[1] arising out of Union's termination of O'Riley's franchise.

The action was originally commenced by Union seeking to recover from O'Riley money owed Union prior to the termination. In response to the complaint, O'Riley cross-complained against Union alleging, among other

[1] Union Oil Company of California is a fictitious business name of Unocal Corporation. Its only non wholly-owned subsidiary is Union Exploration Partners, Ltd.

things, a wrongful termination of his franchise under the PMPA.

Subsequent to the entry of the trial court's judgment, entered in favor of Union on two state law claims, and against Union on the PMPA claim, the California court of Appeal, in the case of *Niakan v. Samaan*, (1988) 199 Cal.App.3d 716, held that jurisdiction of PMPA claims is exclusively federal. The *Niakan* Court relied on and adopted the reasoning of a federal district court case *Rustom v. Atlantic Richfield Co.*, 618 F. Supp. 210 (C.D.Cal. 1985).

Based on the holdings of *Rustom* and *Niakan*, Union appealed the PMPA portion of the judgment on the ground that the trial court had lacked jurisdiction. The California Court of Appeal agreed and reversed the entire judgment.

O'Riley then sought review in the California Supreme Court. Review was denied on February 1, 1990.

REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT MERIT CONSIDERATION FOR CERTIORARI

"Certiorari is granted only in cases involving principles the settlement of which is of importance to the public and in cases where there is a real and embarrassing conflict of opinion and authority between the federal courts of appeal." *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502, 95 L.Ed. 479, 71 S.Ct. 453 (1950).

The issue of jurisdiction over PMPA claims has not yet been addressed by any federal court of appeals. Indeed, Petitioner merely states that the decision below agrees with a decision of a California federal district court rather than with the earlier decision of a Connecticut federal district court. *Compare, Rustom v. Atlantic Richfield Co.*, 618 F.Supp. 210 (C.D. Cal. 1985) with *Ted's Tire Service, Inc. v. Chevron, U.S.A., Inc.*, 470 F.Supp. 163 (D. Conn. 1979).

Petitioner says that "for six years, the holding of *Ted's Tire Service* was cited only with approval in dozens of cases." Petition at 9. However, Petitioner fails to identify *any* case which cites *Ted's Tire* with approval.[2]

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[2] Respondent is aware of only two reported decisions that cite *Ted's Tire* with approval on the issue of PMPA jurisdiction, *Sun Refining & Marketing Co., Inc. v. D'Arpino*, 112 F.R.D. 688 (S.D.N.Y. 1986), and *C.N. Brown Co. v. Gillen* (1990) Maine Sup.Ct. No. 5333, 569 A.2d 1206. *Sun* made no analysis of the issue, merely refusing to accept removal jurisdiction and remanding with the observation that defendant could raise his PMPA issues in the state court. The *Sun* court indicates no awareness of any contra authority. *C.N. Brown* is the only case that makes any analysis and it does come to opposite conclusions on each of the factors cited by *Rustom* and *Niakan*.

Petitioner's assertion of "dozens of cases" is apparently based on the fact that a number of decisions cite *Ted's Tire*, not as precedent for finding PMPA jurisdiction to be exclusive, but merely as parenthetical examples of a case holding jurisdiction of a federal statute to be concurrent: *Cianci v. Superior Court* (1985) 40 Cal.3d 903, 913; (remarking in passing that "[i]n the Petroleum Marketing Practices Act . . . for example, Congress created a private right of action without limiting jurisdiction to

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Petitioner then quite correctly states that "in 1985, the matter was reconsidered in *Rustom* [*supra.*,] . . . [which], relying on its reading of the language and legislative history of the PMPA, decided that Congress intended exclusive jurisdiction over PMPA claims." Petition at 10.

Accordingly, Petitioner has not shown the type of conflict contemplated by *National Labor Relations Board, supra.* The issue is one of interest not to the public at large, but only to a small group of private litigants and no "embarassing conflict of opinion" exists.

II. THERE IS NO SUBSTANTIAL FEDERAL ISSUE TO RESOLVE BECAUSE FEDERAL COURT JURISDICTION OVER PMPA CLAIMS IS EXCLUSIVE

While it is of course correct that a presumption of concurrent jurisdiction over actions arising under a federal statute exists, it is also correct that the presumption is rebuttable "by explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state court jurisdiction and federal interests." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478, 101 S.Ct. 2870, 2875, 69 L.Ed.2d 784, 791 (1981).

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federal courts."); *California Arco Distributors, Inc. v. Atlantic Richfield Co.* (1984) 158 Cal.App.3d 349, 364 (citing *Ted's Tire* as its sole support for the statement that "we are cognizant that state courts have concurrent jurisdiction to enforce the PMPA . . . "); and *Lane v. Central Bank of Alabama*, 756 F.2d 814, 817 (11th Cir. 1985) (Including *Ted's Tire* in a list of decisions supporting the lower court's notation that use of the permissive term "may" in the jurisdictional provision of a federal statute is consistent with the presumption of concurrent jurisdiction).

The PMPA provides that parties may seek redress for violations of the PMPA "in the district court of the United States in any judicial district in which the principal place of business of such franchisor is located or in which such business of such franchisor is located or in which such franchisee is doing business . . . " 15 U.S.C. 2805(a). The PMPA goes on to incorporate federal procedural standards, stating that damages are available "consistent with the Federal Rules of Procedure" and applying Rule 65 standards for the issuance of injunctions. 15 U.S.C. 2805(d)(1)(A); 2805(b)(2). Thus, the plain terms of the statute contemplate federal, not state, jurisdiction over PMPA claims.

There is a conspicuous absence in both the Senate and House Reports, of reference to the bringing of a PMPA claim in state court: "The provisions of Title I are enforceable by private civil action in U.S. District Court." S. Rep. No. 95-731, 95th Cong. 2d Sess. *reprinted in*, 1978 U.S. Code Cong. & Ad News at 874; Rep. No. 95-161, 95th Cong. 1st Sess. 14 (1978).

As the Ninth Circuit reasoned in *Valenzuela v. Kraft, Inc.*, 739 F.2d 434, 436 (9th Cir. 1984),

> "Although not determinative, the absence of reference to the state courts combined with Congress' affirmative references to the federal courts, suggests an intent to make federal jurisdiction exclusive."

The *Valenzuela* court based its holding on references in the legislative history only to the maintenance of an action in federal court and the incorporation of the standards of Fed.R.Civ.P. 65 applied to the issuance of preliminary injunctions.

Recently, the Supreme Court of Pennsylvania carefully reviewed the "few cases which deal with the precise question of whether that presumption is applicable [to the PMPA]." *Johnson v. Mobil Oil Corp.*, 560 A.2d 124, 125 (Pa. 1989). The *Johnson* court was guided "by the carefully researched and soundly reasoned opinion of the Judge Tashima in *Rustom* [*supra.*,] which concluded that such concurrent state court jurisdiction does not exist with respect to actions under the PMPA." *Johnson, supra.*, at 125.

The *Rustom* and *Johnson* courts point to the strong indictions in the legislative history as well as provisions of the PMPA itself as the "unmistakable implication" of Congressional intent overriding the presumption of concurrent jurisdiction.

Ted's Tire, on the other hand, reached an opposite conclusion based solely on a brief linguistic analysis of 15 U.S.C. 2805(a). It makes no study of the legislative history. The court in *Rustom* took note of Congress' specific reference only to federal court jurisdiction (618 F.Supp. at 212), a point overlooked altogether by the court in *Ted's Tire*. Both *Rustom* and *Johnson* properly dismiss the holding of *Ted's Tire* as cursory and analytically deficient. *See, Rustom, supra.*, at 211-212 and *Johnson, supra.*, at 125, fn.1.

As noted above, Congress specifically incorporated into the PMPA only federal standards to govern two particular areas: injunctive relief and damages.

The availability of injunctive relief under the PMPA is governed by 15 USC § 2805(b)(2). In discussing this provision the Senate Report makes unmistakably clear just what standards govern:

> "In utilizing this standard [referring to Sec. 105 of the PMPA, 92 Stat 331, codified as 15 USC Sec. 2805] for the grant of preliminary injunctive relief, the committee has embraced a judicial standard utilized by the Second Circuit." Sen. Rep. No. 95-731, *supra*, at 41, as *reprinted, supra*, 1978 U.S. Code Cong. & Admin. News at 899.

Congress even cited as representative of that standard the Second Circuit's decision in *Jacobson & Co., Inc. v. Armstrong Cork Co.*, 548 F.2d 438 (2d Cir. 1977). *Id.*

The *Rustom* court considered this factor to be significant (618 F. Supp. at 212-13), while *Ted's Tire* missed it completely.

The PMPA further links the measure of damages to federal law by providing that

> "[i]f the franchisee prevails in any action under subsection (a), such franchisee shall be entitled –
>
> "(A) consistent with the Federal Rules of Civil Procedure, to actual damages." 15 USC Sec. 2805(d)(1).

Again, *Rustom* cites this reference as significant (618 F. Supp. at 213) while *Ted's Tire Service* misses it entirely.

III. CONCLUSION

The issues of exclusive versus concurrent jurisdiction over causes of action under the Petroleum Marketing Practices Act, while of significance to a discrete class of litigants, is not appropriate for review by this Court.

Moreover, with only one exception, the courts which have thoughtfully and thoroughly scrutinized the relevant factors have come to the same conclusion as the court below in this case: Congress intended that jurisdiction of PMPA actions be exclusively federal.

It is respectfully urged, therefore, that the Petition be denied.

Respectfully submitted,

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